

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

ANGELA LYNN MARIE NEWTON,

Petitioner,

v.

CAROLYN W. COLVIN, Acting  
Commissioner of Social Security

Respondent.

NO. CV-11-168-RHW

**ORDER DENYING  
PETITIONER'S MOTION FOR  
SUMMARY JUDGMENT;  
GRANTING RESPONDENT'S  
MOTION FOR SUMMARY  
JUDGMENT**

Before the Court are Petitioner's Motion for Summary Judgment, ECF No. 13 and Respondent's Motion for Summary Judgment, ECF No. 17. The motions were heard without oral argument. Petitioner is represented by Rebecca M. Coufal. Respondent<sup>1</sup> is represented by Assistant United States Attorney Pamela De Rusha and Special Assistant United States Attorney Franco L. Becia.

**I. Jurisdiction**

On February 8, 2008, Petitioner Angela Lynn Marie Newton filed an application for Supplemental Social Security Income (SSI) and Social Security

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<sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Michael J. Astrue as the defendant in this suit. No further action need be taken to continue this suit by reason of the last sentence of 42 U.S.C. § 405(g).

1 Disability Insurance Benefits (SSDIB).<sup>2</sup> Petitioner alleges she has been disabled  
2 since November 1, 2005.

3 Her application was denied initially and again denied on reconsideration. A  
4 timely request for a hearing was made and Petitioner appeared before  
5 Administrative Law Judge (ALJ) Moira Ausems on October 1, 2009, in Spokane,  
6 Washington. Petitioner was represented by Gary Penar, an attorney. Debra  
7 LaPointe, a vocational expert, also participated.

8 The ALJ issued a decision on February 26, 2010, finding that Petitioner  
9 was not disabled. Petitioner timely requested review by the Appeals Council,  
10 which was denied March 9, 2011. The Appeals Council's denial of review makes  
11 the ALJ's decision the final decision of the Commissioner. (42 U.S.C. §405(h)).  
12 Petitioner filed a timely appeal with the U.S. District Court for the Eastern District  
13 of Washington on April 6, 2011. The instant matter is before the district court  
14 pursuant to 42 U.S.C. § 405(g).

## 15 **II. Sequential Evaluation Process**

16 The Social Security Act defines disability as the "inability to engage in any  
17 substantial gainful activity by reason of any medically determinable physical or  
18 mental impairment which can be expected to result in death or which has lasted or  
19 can be expected to last for a continuous period of not less than twelve months."  
20 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be  
21 under a disability only if her impairments are of such severity that the claimant is  
22 not only unable to do her previous work, but cannot, considering claimant's age,  
23 education and work experiences, engage in any other substantial gainful work  
24 which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

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26 <sup>2</sup>Petitioner had previously filed dual claims on August 18, 2005, April 13,  
27 2006, and May 4, 2007. The first two were not pursued after initial denials and the  
28 last was not pursued after a denial on reconsideration (Tr. 20.)

1 The Commissioner has established a five-step sequential evaluation process  
2 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a)(4),  
3 416.920; *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987).

4 Step 1: Is the claimant engaged in substantial gainful activities? 20 C.F.R.  
5 §§ 404.1520(b), 416.920(b). Substantial gainful activity is work done for pay and  
6 requires compensation above the statutory minimum. 20 C.F.R. §§ 404.1574,  
7 416.972; *Keyes v. Sullivan*, 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is  
8 engaged in substantial activity, benefits are denied. 20 C.F.R. §§ 404.1571,  
9 416.920(b). If he is not, the ALJ proceeds to step two.

10 Step 2: Does the claimant have a medically-severe impairment or  
11 combination of impairments? 20 C.F.R. §§ 404.1520(c), 416.920(c). If the  
12 claimant does not have a severe impairment or combination of impairments, the  
13 disability claim is denied. A severe impairment is one that lasted or must be  
14 expected to last for at least 12 months and must be proven through objective  
15 medical evidence. 20 C.F.R. §§ 404.1508-09, 416.908-09. If the impairment is  
16 severe, the evaluation proceeds to the third step.

17 Step 3: Does the claimant's impairment meet or equal one of the listed  
18 impairments acknowledged by the Commissioner to be so severe as to preclude  
19 substantial gainful activity? 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 C.F.R.  
20 § 404 Subpt. P. App. 1. If the impairment meets or equals one of the listed  
21 impairments, the claimant is conclusively presumed to be disabled. *Id.* If the  
22 impairment is not one conclusively presumed to be disabling, the evaluation  
23 proceeds to the fourth step.

24 Step 4: Does the impairment prevent the claimant from performing work she  
25 has performed in the past? 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant  
26 is able to perform her previous work, she is not disabled. *Id.* If the claimant  
27 cannot perform this work, proceed to the fifth and final step.

28 Step 5: Is the claimant able to perform other work in the national economy

1 in view of her age, education, and work experience? 20 C.F.R. §§ 404.1520(f),  
2 416.920(f).

3 The initial burden of proof rests upon the claimant to establish a prima facie  
4 case of entitlement to disability benefits. *Tackett v. Apfel*, 108 F.3d 1094, 1098  
5 (9th Cir. 1999). This burden is met once a claimant establishes that a physical or  
6 mental impairment prevents her from engaging in her previous occupation. *Id.* At  
7 step five, the burden shifts to the Commissioner to show that the claimant can  
8 perform other substantial gainful activity. *Id.*

### 9 **III. Standard of Review**

10 The Commissioner's determination will be set aside only when the ALJ's  
11 findings are based on legal error or are not supported by substantial evidence in  
12 the record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992)  
13 (citing 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"  
14 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance."  
15 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n. 10 (9th Cir. 1975). Substantial  
16 evidence is "such relevant evidence as a reasonable mind might accept as adequate  
17 to support a conclusion." *Richardson*, 402 U.S. at 401. The Court must uphold the  
18 ALJ's denial of benefits if the evidence is susceptible to more than one rational  
19 interpretation, one of which supports the decision of the administrative law judge.  
20 *Batson v. Barnhart*, 359 F.3d 1190, 1193 (9th Cir. 2004). "If the evidence can  
21 support either outcome, the court may not substitute its judgment for that of the  
22 ALJ." *Matney*, 981 F.2d at 1019.

23 A decision supported by substantial evidence will be set aside if the proper  
24 legal standards were not applied in weighing the evidence and making the  
25 decision. *Browner v. Secretary of Health & Human Servs.*, 839 F.2d 432, 433 (9th  
26 Cir. 1988). An ALJ is allowed "inconsequential" errors as long as they are  
27 immaterial to the ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec.*  
28 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006).

1 **IV. Statement of Facts**

2 The facts have been presented in the administrative transcript and the ALJ's  
3 decision, and will only be summarized here.

4 At the time of the hearing, Plaintiff was thirty-three years old. She  
5 completed the ninth grade and obtained her GED in 1992. She has worked in a  
6 variety of jobs, including cocktail waitressing, selling cars, retail sales, in-home  
7 care and telemarketing.

8 At the hearing, Petitioner testified she has pain in her neck, shoulders,  
9 elbows, knees, feet and hands. She testified her pain flare-ups are unpredictable  
10 and range in varying degrees of severity. She reported she has experienced daily  
11 tension headaches since childhood. These headaches cause her to vomit at least  
12 once a week. At least two days a month, she cannot lift her head from a pillow  
13 because of the pain, and if she overuses her hands, she has decreased strength. She  
14 also testified if she physically over-exerted herself, she would experience flare-ups  
15 of her pain symptoms. On bad days, she is immobilized by pain. She maintains she  
16 is unable to perform sustained activity eight hours per day due to pain and anxiety-  
17 related symptoms while working around others, and reports she is only able to be  
18 active for 45 minutes to an hour before she needs to rest for at least 30 minutes.  
19 She testified that she rarely leaves home and experiences anxiety around others.

20 She also reported that she is able to live independently and is able to garden,  
21 watch movies, write poetry, walk, grocery shop, and attend appointments. She  
22 does not have any difficulty doing household chores, including vacuuming,  
23 dusting, washing dishes, laundry, or cooking. She uses public transportation. She  
24 paints, visits friends, and handles her finances.

25 **V. The ALJ's findings**

26 Although Petitioner filed prior applications, the ALJ declined to reopen the  
27 applications and found that the adjudicatory period for Petitioner's current  
28 application commenced on August 21, 2007. (Tr. 21.)

1 At step one, the ALJ found Petitioner had not engaged in substantial gainful  
2 activity since November 1, 2005, her alleged disability onset date. (Tr. 23.)<sup>3</sup>

3 At step two, the ALJ found Petitioner had the following severe impairments:

- 4 1. history of a right femoral fracture in 2000, status post right femur/hip  
5 surgery with residual degenerative changes;
- 6 2. history of a left clavicle fracture and whiplash injury in 2000, with  
7 residual left shoulder/neck myalgias and cervicalgia,
- 8 3. history of remote healed right ulnoid fracture with residual  
9 degenerative changes of the radiocarpal joint;
- 10 4. migraine headache disorder associated with temporomandibular joint  
11 syndrome (TMJ);
- 12 5. mild lumbar degenerative disc and facet disease;
- 13 6. fibromyalgia vs. myofascial pain disorder;
- 14 7. major depressive disorder;
- 15 8. post-traumatic stress disorder;
- 16 9. somatoform disorder;
- 17 10. personality disorder; and
- 18 11. a history of alcohol, marijuana, opiate, and benzodiazepine abuse

19 (Tr. 23.)

20 The ALJ did not find that objective medical findings established left hand  
21 degenerative joint disease or any condition affecting the knees or feet, concluding  
22 these alleged symptoms were not a medically determinable severe impairment. (Tr.  
23 24.)

24 At step three, the ALJ found that Petitioner's impairments or combination of  
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26 <sup>3</sup>The ALJ found that although Petitioner had engaged in work activity during  
27 the period in which she alleged disability, these unsuccessful work attempts did  
28 not rise to the level of substantial gainful activity. (Tr. 23.)

1 impairments did not meet or medically equal any of the listed impairments  
2 described at 20 CFR Part 404, Subpart P, Appendix 1. (20 CFR 404.1520(d),  
3 404.1525, 404.1526, 416.925 and 416.926). (Tr. 24.) The ALJ found the mental  
4 impairment(s) did not satisfy the criteria of paragraphs “B” or “C” of the  
5 applicable mental disorder listing. (Tr. 24.)

6 At step four, the ALJ found Plaintiff had the physical residual functional  
7 capacity<sup>4</sup> to perform light work as defined in 20 C.F.R. 404.1567(b) and  
8 416.967(b) except that she cannot climb ladders/ropes/scaffolds; she needs to  
9 avoid concentrated exposure to hazards such as machinery and heights; and she is  
10 unable to perform more than simple, routine tasks that do not involve more than  
11 superficial contact with co-workers and the general public. (Tr. 25.) She  
12 concluded that Plaintiff is capable of performing past relevant work as a locker  
13 room attendant.

14 In the alternative, the ALJ performed step five of the sequential evaluation  
15 process and concluded there are other jobs that exist in significant numbers in the  
16 national economy Plaintiff can perform, including housekeeper/cleaner,  
17 production assembler, and mail clerk, as well as an outside deliverer and a parking  
18 lot attendant. (Tr. 25.)

19 The ALJ concluded that Plaintiff has not been under a disability from  
20 November 1, 2005 through February 26, 2010.

## 21 **VI. Issues for Review**

22 Plaintiff presents the following issues for review:

- 23 1. Whether the ALJ erred in disregarding Petitioner’s treating and  
24 examining physicians’ opinions as well as the opinion of her

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26 <sup>4</sup>An individual’s residual functional capacity is her ability to do physical and  
27 mental work activities on a sustained basis despite limitations from her  
28 impairments.



1 psychologist;

2 2. Whether the ALJ erred in not consulting a medical expert;

3 3. Whether the ALJ erred in not finding severe impairments of anxiety  
4 disorder and celiac disease;

5 4. Whether the ALJ erred in not finding Petitioner credible;

6 5. Whether the ALJ erred in failing to present a hypothetical that  
7 included all of Petitioner's Limitations.

## 8 **VII. Discussion**

### 9 **1. Whether the ALJ erred in disregarding Petitioner's treating and** 10 **examining physicians' as well as her psychologist's opinions, and** 11 **in not consulting a medical expert**

12 Petitioner argues the ALJ "picks and chooses what parts of the various  
13 reports she will utilize." ECF No. 14 at 14. She asserts that the ALJ gave the DDS  
14 record reviewing psychologists, Dr. Kraft and Dr. Flanagan, significant weight,  
15 but did not use their findings in her decision, and erred in giving some, but not all  
16 of Dr. Brown's findings significant weight. Also, the ALJ erred in giving Dr.  
17 Genthe's opinion of marked social imitations little weight. Finally, she argues the  
18 ALJ erred in dismissing Dr. Angell's opinion that he did not believe that Petitioner  
19 was malingering. Consequently, Petitioner faults the ALJ for substituting her  
20 views for the evidence in the record without the assistance of a Medical Expert.  
21 She maintains that picking and choosing what parts of the record she agrees with  
22 is legal error and is not supported by substantial evidence in the record.

23 While the opinion of the treating physician is not necessarily conclusive as  
24 to either the physical condition or the ultimate issue of disability, the ALJ must  
25 present clear and convincing reasons for rejecting the uncontroverted opinion of a  
26 claimant's physician. *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002).

27 "Although the treating physician's opinion is given deference, the ALJ may reject  
28 the opinion of a treating physician in favor of a conflicting opinion of an



1 examining physician if the ALJ makes “findings setting forth specific, legitimate  
2 reasons for doing so that are based on substantial evidence in the record.” *Id.*  
3 (citations omitted). The opinions of non-treating or non-examining physicians may  
4 also serve as substantial evidence when the opinions are consistent with  
5 independent clinical findings or other evidence in the record. *Id.* The ALJ need not  
6 accept the opinion of any physician, including a treating physician, if that opinion  
7 is brief, conclusory, and inadequately supported by clinical findings. *Id.*

8 On January 31, 2008, Thomas Genthe, Ph.D, examining psychologist,  
9 conducted a Psychological Assessment Report. (Tr. 1032.) He noted her  
10 depression and anxiety were in remission and she presented with normal mental  
11 status. (Tr. 1033.) He noted, however, that she has relapsed with respect to her  
12 prescription abuse and failed to engage in mental health counseling. (Tr. 1032.) He  
13 concluded that with treatment, Petitioner could attain a much better level of  
14 functioning within the next six to twelve months. (Tr. 1033.) He noted Petitioner  
15 demonstrated an unusual degree of somatic concerns, which suggested “a  
16 ruminative preoccupation with physical functioning and health matters and severe  
17 impairment arising from somatic symptoms.” (Tr. 1037.) He also noted that her  
18 interpersonal style is best characterized as “friendly and extraverted,” she usually  
19 prefers activities that bring her into contact with others, rather than solitary  
20 pursuits, and she is someone who is comfortable in most social situations. (Tr.  
21 1039.)

22 On March 24, 2008, Dr. Angell, Petitioner’s treating physician, completed a  
23 Physical Evaluation form and found Petitioner’s overall work level to be  
24 sedentary. (Tr. 1042.) He found she had moderate to marked fibromyalgia, mild to  
25 marked chronic headaches, mild to moderate insomnia, and moderate anxiety. (Tr.  
26 1042.) In 2009, Dr. Muramatsu also completed a Physical Evaluation form and  
27 also rated Petitioner capable of performing “sedentary” work. (Tr. 1096).

28 Patricia Kraft, Ph.D., reviewing medical consultant, completed a Mental

1 Residual Functional Capacity Assessment and a Psychiatric Review Technique  
2 form on April 21, 2008. (Tr. 1054.) She noted Petitioner was moderately limited  
3 in: (1) the ability to work in coordination with or proximity to others without  
4 being distracted by them; (2) the ability to complete a normal work-day and  
5 workweek without interruptions from psychologically based symptoms and to  
6 perform at a consistent pace without an unreasonable number and length of rest  
7 periods; (3) the ability to interact appropriately with the general public; and (4) the  
8 ability to get along with coworkers or peers without distracting them or exhibiting  
9 behavior extremes. (Tr. 1054-55.). She concluded Petitioner had the ability to  
10 understand, remember and carry out non-complex and complex instructions and  
11 tasks and would work best with superficial public and coworker contact. (Tr.  
12 1054.) In reviewing her functional limitations, Dr. Kraft concluded Petitioner had  
13 a mild limitation in restrictions of activities of daily living, and moderate  
14 difficulties in maintaining social functioning, and moderate difficulties in  
15 maintaining concentration, persistence or pace. (Tr. 1068.) On reconsideration,  
16 Rita Flanagan, Ph.D., reviewing medical consultant, conducted a case analysis on  
17 June 6, 2008, and affirmed the MRFC/PRTF limitations identified by Dr. Kraft  
18 (Tr. 1081.)

19 On January 31, 2009, Cheyenne Kelling<sup>5</sup>, M.A. conducted a  
20 Psychological/Psychiatric Evaluation and rated Petitioner as “marked” in the  
21 following areas: verbal expression of anxiety or fear; social withdrawal, physical  
22 complaints; and global illness. She identified the following moderate functional  
23 limitations: (1) ability to exercise judgment and make decisions; (2) ability to  
24 perform routine tasks; (3) ability to relate appropriately to co-workers and  
25 supervisors; (4) ability to interact appropriately in public contacts; (5) ability to  
26 respond appropriately to and tolerate the pressures and expectations of a normal

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28 <sup>5</sup>Ms. Kelling was supervised by Debra Brown, Ph.D.

1 work setting; and (6) ability to control physical and motor movements and  
2 maintain appropriate behavior. (Tr. 1086.) In their written assessment, Ms. Kelling  
3 and Debra Brown, Ph.D. concluded that Petitioner met the criteria for somatization  
4 disorder in that her symptoms could not be fully explained by a known general  
5 medical condition.<sup>6</sup> (Tr. 1093.) They ultimately concluded that if she could work  
6 on her grief, she might experience some relief from her physical symptoms. (Tr.  
7 1093.)

8 Here, the ALJ set forth specific, legitimate reasons for rejecting the treating  
9 and evaluating physician's opinions. Her reasons are supported by substantial  
10 evidence in the record. With respect to Dr. Genthe, she gave little weight to his  
11 conclusions that Petitioner had marked cognitive and social functioning. She noted  
12 that Dr. Genthe's conclusion was based on Petitioner's inability to remain clean  
13 and sober and follow-through with mental health treatment. She also concluded  
14 that his notations were inconsistent with his contemporaneous mental evaluation  
15 in that Dr. Genthe observed normal mental status and found her to be  
16 "cooperative" and "friendly." (Tr. 30.)

17 With respect to Drs. Angell and Muramatsu's opinion that Petitioner was  
18 limited to sedentary work, the ALJ rejected these findings, concluding that the  
19 opinions were not consistent or supported by the findings reported by each source  
20 in the treatment notes upon contemporaneous physical exam and with Petitioner's  
21 admitted daily functioning and other reported activities, including housecleaning,

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22 <sup>6</sup>As they explained:

23  
24 This is a chronic condition and the disorder rarely remits  
25 completely. Essentially, counseling is not effective because  
26 individuals with this type of disorder do not think there is anything  
27 psychologically wrong with them. They seek answers for their  
28 distress through medical doctor shopping. Since there is rarely  
anything truly physically wrong with them, and they do not receive  
relief from the medical treatment they receive, they can become  
frustrated and have a high potential for lawsuits. Great care should be  
taken by physicians when prescribing medications.  
(Tr. 1093.)

1 cooking, shopping, and chopping wood. (Tr. 29, 30.)

2 With respect to Dr. Brown's opinions, the ALJ found that Dr. Brown's  
3 conclusions that Petitioner was moderately limited in her abilities to exercise  
4 judgment and make decisions, perform routine tasks, handle the pressures of a  
5 normal work setting, and control and maintain appropriate behavior were not  
6 supported by the weight of the evidence. (Tr. 30.) She found these limitations were  
7 inconsistent with Petitioner's presentation and performance upon repeated mental  
8 status examinations. (Tr. 30.)

9 The ALJ incorporated Drs. Kraft and Flanagan's mental limitations by  
10 requiring simple, routine tasks that do not involve more than superficial contact  
11 with co-workers and the general public. (Tr. 30.) Notably, however, the ALJ did  
12 not specifically address Dr. Kraft's finding that Petitioner has moderate limitations  
13 in the ability to complete a normal work-day and workweek without interruptions  
14 from psychologically based symptoms and to perform at a consistent pace without  
15 an unreasonable number and length of rest periods. She did state that the mental  
16 health limitations were consistent with Petitioner's presentation and performance  
17 during her mental examinations as well as her admitted daily living activities. (Tr.  
18 30.) By doing so, the ALJ indicated the reason for rejecting this particular  
19 limitations, in that the limitation is not supported by the record as a whole. *See*  
20 *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9<sup>th</sup> Cir. 2004) (holding  
21 that ALJ may discredit treating physician's opinions that are conclusory, brief, and  
22 unsupported by the record as a whole, or by objective medical findings).

23 Plaintiff has not shown that the ALJ committed legal error in rejecting  
24 certain portions of the provider's opinions.

25 **2. Whether the ALJ erred in not finding severe impairments of**  
26 **anxiety disorder and celiac disease**

27 Petitioner argues the ALJ erred in failing to find severe impairments of  
28 anxiety disorder and celiac disease. Petitioner relies on Dr. Kraft's diagnosis of

1 anxiety disorder, as well as Dr. Muramatsu and Dr. Angell's findings that  
2 Plaintiff's celiac disease is severe.

3 Respondent asserts that even if the ALJ did error in not specifically  
4 identifying these as several impairments at step two, the omission was harmless  
5 because the residual functional capacity assessment accounted for her anxiety  
6 disorder, specifically, the limitation that Plaintiff would "work best with  
7 superficial public and co-worker contact." Respondent also points out Dr. Genthe  
8 found in 2008 that Plaintiff's anxiety disorder was in remission. Additionally,  
9 Respondent argues it was harmless error in failing to identify celiac disease  
10 because Petitioner has not identified any specific assessed limitation caused by the  
11 celiac disease that was not already accounted for in the residual function capacity  
12 assessment.

13 An impairment or combination of impairments is "severe" within the  
14 meaning of the regulations if it significantly limits an individual's ability to  
15 perform basic work activities. 20 C.F.R. §§ 404.1521, 216.921. An impairment or  
16 combination of impairments is "not severe" when medical and other evidence  
17 establish only a slight abnormality or a combination of slight abnormalities that  
18 would have no more than a minimal effect on an individual's ability to work. *Id.*

19 The ALJ concluded that Petitioner's allegations of anxiety-related  
20 symptoms were not consistent with the record. She reviewed Petitioner's mental  
21 health treatment during the relevant period and concluded that between 2007 and  
22 2009, she appeared to be managing her anxiety, both with and without the use of  
23 medication (Tr. 27.)

24 The record supports this finding. Notably, in a letter dated January 22, 2007,  
25 Dr. Angell indicated that anxiety is likely the most consistent and disabling  
26 condition and one that would likely prevent her from obtaining and maintaining  
27 employment. (Tr. 910.) He goes on to say, however, that he is confident that she  
28 will excel in the workforce when her anxiety is treated. (Tr. 910.) A couple of

1 months later, Dr. Angell remarked that Petitioner had generally been functioning  
2 well, even though she was not taking Librium. In 2008, Dr. Genthe found that her  
3 anxiety disorder was in remission and during this time, Petitioner told Dr. Angell  
4 that she has fewer panic attacks and felt she could tolerate a lower dose of the anti-  
5 anxiety medicine. (Tr. 1268.) In June, 2009, Dr. Angell noted that Petitioner has  
6 been doing better than she has in years, and specifically noted that Petitioner  
7 reported that her anxiety/panic attacks have mostly resolved. (Tr. 1209.)

8 Also, in April 30, 2009, Dr. Angell noted that while Petitioner was  
9 diagnosed with celiac disease in February, 2009, she has been doing well by  
10 avoiding gluten most of the time. (Tr. 1203.)

11 Given that the record supports that Petitioner's anxiety disorder has been  
12 managed by medication and has mostly resolved itself, the ALJ did not err in  
13 concluding that her previously diagnosed anxiety disorder did not significantly  
14 affect her ability to perform basic work activities during the relevant time period.  
15 Moreover, even if the ALJ erred in not listing her anxiety disorder at step two, it  
16 was harmless because the residual functional capacity assessment accounted for  
17 any limitation caused by her anxiety. Likewise, Petitioner has not identified any  
18 limitations caused by her celiac disease that should have been considered by the  
19 ALJ.

### 20 3. Whether the ALJ erred in not finding Plaintiff credible

21 Petitioner argues the ALJ failed to provide a proper basis to find her less  
22 than credible. Petitioner does not challenge any specific basis relied upon by the  
23 ALJ in not finding her credible.

24 An ALJ's assessment of a claimant's credibility is entitled to "great weight."  
25 *Anderson v. Sullivan*, 914 F.2d 1121, 1124 (9<sup>th</sup> Cir.1990). When there is no  
26 evidence of malingering, the ALJ must give "specific, clear and convincing  
27 reasons" for rejecting a claimant's subjective symptom testimony. *Molina v.*  
28 *Astrue*, 674 F.3d 1104, 1112 (9<sup>th</sup> Cir. 2012) (citation omitted); *accord Taylor v.*



1 *Comm'r of Soc. Sec. Admin.*, 659 F.3d 1228, 1234 (9<sup>th</sup> Cir. 2011) (*citing*  
2 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9<sup>th</sup> Cir. 2007)). If the ALJ's  
3 credibility finding is supported by substantial evidence in the record, the  
4 reviewing court "may not engage in second-guessing." *Thomas v. Barnhart*, 278  
5 F.3d 947, 959 (9<sup>th</sup> Cir. 2002).

6 In recognition of the fact that an individual's symptoms can sometimes  
7 suggest a greater level of severity of impairment than can be shown by the  
8 objective medical evidence alone, 20 CFR 404.1529(c) and 416.929(c) describe  
9 the kinds of evidence, including the factors below, that the ALJ must consider in  
10 addition to the objective medical evidence when assessing the credibility of an  
11 individual's statements:

12 1. The individual's daily activities; 2. The location, duration,  
13 frequency, and intensity of the individual's pain or other symptoms;  
14 3. Factors that precipitate and aggravate the symptoms; 4. The type,  
15 dosage, effectiveness, and side effects of any medication the  
16 individual takes or has taken to alleviate pain or other symptoms; 5.  
17 Treatment, other than medication, the individual receives or has  
18 received for relief of pain or other symptoms; 6. Any measures other  
than treatment the individual uses or has used to relieve pain or other  
symptoms (*e.g.*, lying flat on his or her back, standing for 15 to 20  
minutes every hour, or sleeping on a board); and 7. Any other factors  
concerning the individual's functional limitations and restrictions due  
to pain or other symptoms.  
SSR 96-7P, 1996 WL 374186.

19 In her Order, the ALJ concluded that the objective medical evidence did not  
20 support Petitioner's assertion of total disability. The inconsistencies are set forth  
21 above. She relied on the following instances that she found undermined  
22 Petitioner's credibility: the failure to engage in mental health counseling; her  
23 continued request for early refills of her medications; not adhering to treatment  
24 recommendations; unexplained or inadequately explained failure to seek  
25 treatment; and evidence of drug-seeking behavior. She also relied on the fact that  
26 Plaintiff is capable of housework, including vacuuming, dusting, washing dishes,  
27 laundry, and cooking as well as gardening. She watches television, reads, paints,  
28 writes poetry, or is on the computer. She uses public transportation and visits



1 friends. The ALJ noted that in August, 2008, Petitioner was socializing at a local  
2 bar. (Tr. 1119.) The ALJ found that this evidence was inconsistent with  
3 Petitioner's allegations of more limiting mental symptoms.

4 Here, the ALJ provided clear and convincing reasons for her credibility  
5 determination that were supported by substantial evidence.

#### 6 **4. Conclusion**

7 The ALJ's residual functional capacity finding and vocational hypothetical  
8 question properly accounted for all of Plaintiff's physical and mental limitations  
9 that the ALJ found credible. Notably, Petitioner has not identified any additional  
10 limitations that should have been included in the hypothetical. Plaintiff has not  
11 met her burden of showing that the ALJ committed legal error, or that her  
12 conclusion that Plaintiff was not disabled from November 1, 2005 to February 26,  
13 2010 was not supported by substantial evidence.

14 Accordingly, **IT IS HEREBY ORDERED:**

15 1. Petitioner's Motion for Summary Judgment, ECF No. 13, is **DENIED**.

16 2. Respondent's Motion for Summary Judgment, ECF No. 17, is  
17 **GRANTED**.

18 3. The decision of the Commissioner denying benefits is affirmed.

19 4. The District Court Executive is directed to enter judgment in favor of  
20 Respondent and against Plaintiff.

21 **IT IS SO ORDERED.** The District Court Executive is hereby directed to  
22 file this Order and provide copies to counsel, and **close the file**.

23 **DATED** this 25<sup>th</sup> day of February, 2013.

24  
25 *s/Robert H. Whaley*  
26 **ROBERT H. WHALEY**  
27 United States District Judge

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**ORDER DENYING PETITIONER'S MOTION FOR SUMMARY  
JUDGMENT; GRANTING RESPONDENT'S MOTION FOR SUMMARY  
JUDGMENT ~ 16**